Supreme Court, U.S.
FILED
JUN 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1925

In The
Supreme Court of the United States
October Term 1985

CEMENTCRAFT, INC.,
Petitioner,

vs.

CONCRETE UNLIMITED, INC. and
CARLOS PASCUAL,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOSEPH ZALLEN
2455 East Sunrise Boulevard
Suite 1105
Fort Lauderdale, Florida 33304
305-565-9506
Attorney for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

app

QUESTION PRESENTED

Whether a patent owner has the right to enforce his patent during the course of litigation where the patent was not held invalid until the end of the litigation and the patent was not fraudulently obtained.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	2
REASONS FOR DENYING THE WRIT	3
CONCLUSION	4

TABLE OF AUTHORITIES

Page

CASES:

A.E. Staley Manufacturing Co. v. Old Rock Distilling Co., 223 FSupp 798, 140 USPQ 312 (WDMO 1963) 4

Airtex Corp. v. Shelley Radiant Ceiling Co., 536 F2d 145, 190 USPQ 6 (CA7-1976) 4

Anchor Plastics Co., Inc. v. Dynex, 363 FSupp 582, 179 USPQ 264 (DCNJ 1973) 4

Blonder-Tongue Lab, Inc. v. Univ. of Illinois Foundation, 402 US 313 (1971) 3

Brown v. Myerberg, 314 FSupp 939 (1970) 4

S.W. Farber, Inc. v. Texas Instruments, 344 F2d 907, 145 USPQ 304 (CA3 1965), cert. denied, 382 US 843 (1965) 4

Virtue v. Creamer Package Mfg. Co., 277 US 8 (1913) 3

Walker Process Equipment, Inc. v. Food Machinery and Chemical Corp., 382 US 172 (1965) 3

OTHER AUTHORITIES:

35 USC 103 1

35 USC 282 3

STATEMENT OF THE CASE

The statement of the case is accurately stated by the Court of Appeals the substance of which is reproduced below.

Concrete Unlimited manufactures and installs concrete balconies assembled from precast elements in buildings such as high rises in Florida. The '028 patent filed in 1970 and issued in 1971 discloses a precast reinforced concrete post and railing assembly for installation on concrete balconies. The posts include an embedded steel reinforcing rod extending below the bottom of each post that forms an anchoring dowel. The posts have longitudinal grooves into which the panels are slid from the top of the posts. When the panels are in place, the top panel extends above the top of the posts.

Cementcraft copied Concrete Unlimited's railing and this suit for infringement was filed. Cementcraft counterclaimed the '028 patent was invalid and that Concrete Unlimited competed unfairly by attempting to enforce its patent because it was fraudulently obtained.

In 1968, Concrete Unlimited installed the "Coral Ridge" balcony railing deemed similar to the railing disclosed in the '028 patent except that the former's top panel does not extend above the top of the posts and that the Coral Ridge structure has a concrete cap, not found in the structure of the '028 patent. The "Coral Ridge" balcony was held to constitute a public use that qualifies as "prior art" under 35 USC 103.

The District Court found the patent to be obvious under 35 USC 103, specifically found that the patent was

not fraudulently obtained but also found that Concrete Unlimited was nevertheless guilty of unfair competition for enforcing the patent. The Court of Appeals sustained the finding of invalidity but reversed the judgment of unfair competition stating that "Concrete Unlimited had the right to exclude others from making, using or selling the invention and to enforce those rights until the '028 patent was held invalid."

The defendant asked for a re-hearing and a hearing en banc, both of which were denied. After the decision of the Court of Appeals, the defendant Cementcraft moved in the District Court to change the language of the District Court Judgment, which was denied.

———o———

SUMMARY OF THE ARGUMENT

Petitioner has not shown any reason why a Writ of Certiorari should be granted. The Court of Appeals for the Federal Circuit has rendered a decision in this case which is in harmony with the decisions of the Supreme Court and other Courts of Appeal namely, that a patentee has the right to exclude others from making, using and selling an invention and to enforce those rights until or unless the patent is held invalid where the patent has not been obtained by fraud.

———o———

REASONS FOR DENYING THE WRIT

The petitioners have failed to present any special or important reasons why this case should be selected for review.

The petitioner's reference to *Walker Process Equipment, Inc. v. Food Machinery and Chemical Corp.*, 382 U.S. 172 (1965) is inappropriate. The Walker case dealt with a claim under the Sherman Act arising from a fraudulently obtained patent. In the present case, the District Court explicitly found that the patent was not fraudulently obtained.

Likewise *Blonder-Tongue Lab, Inv. v. Univ. of Illinois Foundation,* 402 U.S. 313 (1971) is not applicable since the thrust of that case was that once a patent was ruled invalid the ruling could be asserted as collateral estoppel in a later case.

The petitioner is also distorting the decisions of the Court of Appeals for the Federal Circuit as to the presumption of validity. The Court in this case merely repeated what it has said in many cases namely, that 35 USC 282 confers a presumption of validity to a patent and places upon the challenger the burden of persuasion against validity by clear and convincing evidence.

The decision of the Court of Appeals for the Federal Circuit in this case that "Concrete Unlimited had the right to exclude others from making, using or selling the invention and to enforce those rights until the '028 patent was held invalid" is in harmony with the Supreme Court case of *Virtue v. Creamer Package Mfg. Co.*, 277 US 8 (1913), with the decisions of the other courts of appeal,

as exemplified by *Airtex Corp. v. Shelley Radiant Ceiling Co.*, 536 F2d 145, 190 USPQ 6 (CA7-1976), and *S.W. Farber, Inc. v. Texas Instruments*, 344 F2d 957, 145 USPQ 304 (CA3 1965), cert denied, 382 US 843 (1965) and with leading District Court decisions, as for example, *A.E. Staley Manufacturing Co. v. Old Rock Distilling Co.*, 223 FSupp 798, 140 USPQ 312 (WDMO 1963), *Anchor Plastics Co., Inc. v. Dynex*, 363 FSupp 582, 179 USPQ 264, (DCNJ 1973), and *Brown v. Meyerberg*, 314 FSupp 939, 164 USPQ 505 (SDNY 1970).

CONCLUSION

The Petition for Writ of Certiorari should be denied for want of special or important reasons therefor.

Respectfully submitted,

JOSEPH ZALLEN
2455 East Sunrise Boulevard
Suite 1105
Fort Lauderdale, Florida 33304
305-565-9506

Attorney for Respondents